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IN THE

Supreme Court of the United States

MARTIN GOLD, as Trustee of the Martin Gold, Attorney at Law, P.C. Defined Benefit Pension Plan dated 12-10-87, individually and on behalf of others similarly situated,

Petitioner,

—v.—

SQUADRON, ELLENOFF, PLESENT, & LEHRER, SQUADRON, ELLENOFF, PLESENT & SHEINFELD, LLP and IRA L. SORKIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT APPELLATE DIVISION—FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a state law claim pending in federal court as a claim pendent to a federal statutory claim is dismissed without prejudice because the federal court declines to exercise supplemental jurisdiction after the federal statutory claim is dismissed, does 28 U.S.C. § 1367(d) toll the state statute of limitation during the pendency of the state law claim in federal court?

2. Does the Supremacy Clause, U.S. Constitution, Article VI, Cl. 2, require state courts to apply the tolling provisions of 28 U.S.C. § 1367(d) to state-law claims during their pendency in federal court?

LIST OF PARTIES

The caption contains the names of all the parties. No corporate listing is required under Rule 29.6 because petitioner is a natural person.

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Martin Gold petitions for a writ of certiorari to review the New York state court judgment holding that, notwithstanding the federal tolling provision in 28 U.S.C. § 1367(d), "state law controls" (A8) the tolling of statutes of limitations for state-law claims pending in federal court. This Court should grant the writ because only this federal court can require state courts to enforce 28 U.S.C. § 1367(d) given that this tolling provision is applied only to actions filed in a state court after dismissal of state-law claims from an earlier federal action.

CITATION TO OPINION BELOW

Petitioner seeks review of an order of the New York Appellate Division, First Department that is reported at 286 A.D.2d, 57, 732 N.Y.S.2d 565 (1st Dep't 2001) and is set out in the Appendix (A1). That order adopts and affirms an opinion and order of the Supreme Court, State of New York, New York County, which is unreported and set out in the Appendix (A3).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) because the petitioner seeks review from a state court decision denying him a right claimed under a statute of the United States – the right to the tolling of state statutes of limitations pursuant to 28 U.S.C. § 1367(d) during the time his state-law claims were pending in federal court. The date of the order to be reviewed is November 13, 2001, the date on which the New York Supreme Court Appellate Division, First Department affirmed a lower court order dismissing the complaint on statutes of limitations grounds. Petitioner thereafter exhausted his right to review by the state court of

last resort, the New York Court of Appeals, by filing a notice of appeal and by motion for leave to appeal. The New York Court of Appeals dismissed the notice of appeal in an order reported at 97 N.Y.2d 725, 767 N.E.2d 153 (N.Y. 2002) and set out in the Appendix (A12). The New York Appellate Division, First Department denied leave to appeal to the Court of Appeals in an unreported order set out in the Appendix (A10). The New York Court of Appeals denied leave to appeal in an order reported at 98 N.Y.2d 606, __ N.E.2d __ (N.Y. June 13, 2002) and set out in the Appendix (A14). The petition to this Court for a writ of certiorari is timely under Rule 13.1 because it is filed within 90 days after the New York Court of Appeals denied discretionary review.

CONSTITUTIONAL CLAUSE AND STATUTE INVOLVED

U.S. Const., Art. VI, Cl. 2:

[T]he Laws of the United States . . . shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. § 1367:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States

Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

* * *

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of thirty days after it is dismissed unless state law provides for a longer tolling period.

* * *

STATEMENT OF THE CASE

This case concerns the application of the federal supplemental jurisdiction statute – and, specifically, its tolling provision – to state-law claims dismissed without prejudice after the district court dismisses claims over which it had

original jurisdiction (A4). The statute, 28 U.S.C. § 1367, authorizes federal district courts to exercise jurisdiction over pendent state-law claims – i.e., claims that would not, standing alone, come within a district court's original jurisdiction, but that "are so related to" claims within the court's original jurisdiction "that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). The same statute tolls the limitations period for such claims while they are pending in federal court and for 30 days after they are dismissed. 28 U.S.C. § 1367(d).

The federal complaint that preceded the state court action that is the subject of this petition was filed against respondents on June 7, 1993 in the Southern District of New York (A6). It alleged that respondents aided and abetted others to defraud a class of investors in a Ponzi scheme that caused hundreds of millions of dollars in damages in violation of the anti-fraud provisions of federal securities law, i.e., Rule 10b-5 and § 10(b) of the Securities Act of 1934, 15 U.S.C. § 78j(b), as well as state law. The district court had original jurisdiction over the federal claim under 28 U.S.C. § 1331 and supplemental jurisdiction over state-law claims under 28 U.S.C. § 1367(a). Section 1367(a) states, in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

At the time the federal action was brought in 1993, aiding and abetting was an established basis for § 10(b) liability based upon opinions rendered by the courts of appeal. In 1994, however, this Court held that § 10(b) did not create aiding and abetting liability. *Central Bank v. First Interstate Bank,* 511 U.. 1164 (1994). In response to that decision petitioner filed amended complaints alleging that respondents violated § 10(b) directly and not simply as aiders and abettors. In a series of decisions thereafter issued by a magistrate judge, the district court and the Court of Appeals, these courts considered the scope of a § 10(b) violation in light of the *Central Bank* decision. The district court held that although aiding and abetting liability was no longer a viable basis for liability, petitioner nonetheless could plead a federal claim of conspiracy to violate Rule 10b-5 and § 10(b). *In re Towers Financial Noteholders Litigation,* 936 F. Supp. 126, 129 (S.D.N.Y. 1991) ("If plaintiffs can put these allegations [of conspiracy] – which were so eloquently described by their counsel at oral argument – into a formal pleading, such a pleading would constitute a valid allegation that Sorkin had knowingly and wilfully engaged in a deliberate conspiracy unlawfully to obtain funds by the deception of investors, in violation of Rule 10b-5.") The Second Circuit disagreed and reversed, holding that the federal anti-fraud statute simply did not cover conspiracy based upon its analysis of the *Central Bank* decision. *Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin,* 135 F.3d 837 (2d Cir. 1998). The debate over how to apply the *Central Bank* decision, however, consumed many years.

A final judgment dismissing the federal claim with prejudice and the state-law claims without prejudice was entered on November 18, 1998 (A6). The state-law claims were dismissed for the reason stated in the supplemental

jurisdiction statute (A7), 28 U.S.C. § 1367(c)(3), namely, "the district court has dismissed all claims over which it has original jurisdiction" under 28 U.S.C. § 1331. Although an appeal to the Second Circuit was noticed, it was withdrawn by stipulation of the parties on March 9, 1999 (A6). Before the appeal was withdrawn, petitioner filed his case in New York state court in February 1999, pursuing the state-law claims dismissed without prejudice in federal court (A6).

Section 1367(d), by its terms, provides that the state limitations period "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed" and should have been so applied by the state court. *Raygor v. Regents of the University of Minnesota,* 534 U.S. 533, __, 122 S. Ct. 999, 1005 (2002) ("If subsection (d) applied in such circumstances, it would toll the state statutes of limitations for 30 days in addition to however long the claim had been pending in federal court.").

Petitioner raised this very point, and the federal question sought to be reviewed here, in the state trial court as soon as respondents moved to dismiss the complaint on statute of limitations grounds (A8). The state-law statute of limitations applicable to the state-law claims is six years (A5) and petitioner pointed out that 28 U.S.C. § 1367(d) tolled that six-year period during the pendency of the state-law claims in federal court.

The arithmetic calculation that the state-law claims were timely filed in state court if 28 U.S.C. § 1367(d) tolled the statutes of limitations is not in dispute. The last incident of fraud that petitioner alleges occurred on December 26, 1992 (A5). The state-law claims were pleaded against respondents as part of the federal action on June 7, 1993 (A6). The federal action tolled the state-law limitations period by operation of 28 U.S.C. § 1367(d) until thirty days after final judgment was

entered on November 16, 1998 (A6) – that is, until December 16, 1998. The state court action commenced on February 5, 1999 (A7). Accordingly, five months and eleven days of the six-year state limitations period ran between December 26, 1992 and June 7, 1993. An additional 51 days ran between December 16, 1998 and February 5, 1999. This means a total of only seven months ran on the six-year state limitations period.

Under New York state law, statutes of limitations are not suspended during the pendency of an action. Rather than apply 28 U.S.C. § 1367, the state court applied state law to the question of whether statutes of limitations are tolled during the pendency of state-law claims in federal court, held that petitioner's action was untimely, and dismissed it for that reason. As a result, the state court never afforded petitioner the benefit of federal tolling.

Congress enacted the supplemental jurisdiction statute as part of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, to codify the common-law doctrines of pendent and ancillary jurisdiction. See H.R. Rep. No. 734 (House Report), 101st Cong., 2d Sess. 27-29 (1990); *City of Chicago v. International Coll. of Surgeons*, 522 U.S. 156, 165 (1997). In *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), the Court held that district courts, when adjudicating federal-law claims within their subject-matter jurisdiction under 28 U.S.C. § 1331, also may adjudicate state-law claims over which they would not otherwise have jurisdiction, if the federal-law and state-law claims "derive from a common nucleus of operative fact" and thus comprise "but one constitutional 'case' " under Article III. 383 U.S. at 725.

In a series of decisions after *Gibbs*, the Court identified various limits on a district court's ability to adjudicate claims

that, although not independently within its subject-matter jurisdiction, are related to claims within its jurisdiction. See, e.g., *Aldinger v. Howard*, 427 U.S. 1 (1976); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978). In *Finley v. United States*, 490 U.S. 545 (1989), the Court held that a district court could not, in the absence of Congressional authorization, exercise jurisdiction over pendent parties, i.e., parties that are not the subject of any claim independently within the district court's jurisdiction. Congress responded by enacting 28 U.S.C. § 1367, which codified the doctrine of pendent jurisdiction that was recognized in *Gibbs* and provided the Congressional authorization that the Court found lacking in *Finley* by expressly permitting pendent party jurisdiction. See Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. New Eng. L. Rev. 1 (1992).

REASON FOR GRANTING THE WRIT

The writ should be granted because the state courts refused to apply the tolling provision of 28 U.S.C. § 1367(d) in derogation of the state courts' duty under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2 to enforce federal law. Because the tolling provision of 28 U.S.C. § 1367(d) applies only to actions filed in a state court after dismissal of state-law claims from an earlier federal action, only this federal court can require state courts to enforce that statute.

Equally important, tolling the state limitations period protects federal court jurisdiction. Given 28 U.S.C. § 1367(d), litigants should not need to divide a case and file parallel state court actions because of statutes of limitations concerns. Further, § 1367(d) allows district courts to assess whether to retain jurisdiction over state-law claims free from concerns

about whether the claims, if dismissed, could be timely filed in state court. Only this federal court can enforce federal tolling in order to eliminate the incentive for district courts to retain jurisdiction over state-law claims that, for reasons of comity or otherwise, are better suited for adjudication in state court. See John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855, 945 (1998) ("Congress clearly intended subsection 1367(d) to facilitate discretionary dismissal under subsection 1367(c) by relieving courts of concerns about the inequitable consequences of state limitations law barring the dismissed claim from refiling.").

The failure of the New York state courts to enforce the federal statute is obvious – the federal statute says that the statutes of limitations applicable to state-law claims are to be tolled, but the state courts did not give petitioner the benefit of that toll, notwithstanding the Supremacy Clause, which required them to do so.

CONCLUSION

For the reasons stated above, petitioner asks the Court to grant his petition and issue a writ of certiorari to the New York Supreme Court, Appellate Division, First Department.

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New York, New York

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